IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. 10-0027

IN RE THE GRANDPARENT-GRANDCHILD
CONTACT OF

W.B.S., AND D.C.S.,

Minor Children,

TANYA N. SPAULDING,

Appellant,

-and-

SHARON K. SNYDER,

Appellee.

On Appeal from the Thirteenth Judicial District Court
Yellowstone County, Montana
Cause No. DR 07-943, Judge Gregory R. Todd
IN RE THE VISITATION OF W.B.S., AND D.C.S., Minor Children,
SHARON K. SNYDER, Petitioner -and- TANYA N. SPAULDING, Respondent.

APPELLANT'S BRIEF

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COMES NOW the Appellant, Tanya N. Spaulding, acting by and through her attorney of record, Benjamin J. LaBeau, and respectfully submits Appellant's Brief.

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4. APPELLANT'S STATEMENT OF THE CASE.

A. Nature of Case and Procedural Disposition in District Court.

This case involves a mother's efforts to terminate existing grandparent contact with her children under § 40-9-102, MCA. Grandmother Sharon Snyder petitioned for grandparent-grandchild contact in 2007. On May 22, 2008, custodial mother, Tanya Spaulding signed a stipulation providing for specific periods of grandparent contact with her two minor children. On May 27, 2008, the District Court signed an order adopting the stipulation and ordering the parties to abide by its terms. Contact between grandmother and grandchildren took place from June 2008, until August 2009.

In August 2009, mother terminated contact between grandmother and her children. Mother revived legal proceedings in the case on September 11, 2009, by filing: 1) Motion to Terminate Stipulation and Order and Grandparent Visitation, 2)

Brief in Support, and 3) Mother's Affidavit. Grandmother responded on September 22, 2009, by filing: 1) Response to Motion to Terminate Grandparent Contact and Cross-Motion for Contempt, and 2) Attorney Affidavit. Mother opposed the cross-motion for contempt by filing her Response and Opposition to Petitioner's Cross-Motion for Contempt.

In her September 11, 2009 Brief, Tanya asserted her constitutional rights as a parent and her objection to grandparent contact. She outlined the applicable standard of § 40-9-102, requiring a determination of parental fitness, and a presumption in favor of the wishes of a fit parent. Hearing on mother's termination motion and grandmother's contempt motion took place on December 21, 2009.

At the outset of hearing both attorneys and the judge discussed the admissibility of evidence and the applicable standard to apply. Sharon's attorney objected to any evidence about past events prior to the May 22, 2008 Stipulation, arguing it was irrelevant, and stating that the standard of § 40-4-219, MCA, should apply, so that only events post-May 22, 2008, should be heard by the Court.

Tanya's attorney responded that evidence of past events was relevant to support Tanya's explanation why she terminated contact, objected to further contact and wished to abolish the stipulation. The Court ruled that past evidence should be restricted. This discussion occurs in the Condensed Transcript of hearing at page 9,

line 6 through page 11, line 20.

The Court heard testimony from mother, grandmother, and grandmother's daughter, Pamela Wright. The Court entered its Order on December 30, 2009. The Court denied mother's motion to terminate the stipulation and order and grandparent contact. The Court held the mother Tanya Spaulding in contempt of the Court's Order adopting the stipulation for grandparent-grandchild contact, and ordered compliance with the stipulation of May 22, 2008.

The Court found the signed stipulation was a contract which negated application of § 40-9-102, MCA. The Court concluded the applicable standard to change the grandparent contact stipulation was the same as for a parenting plan modification under § 40-4-219, MCA. The Court ruled that, considering the evidence presented, Tanya did not meet her burden of proof.

Tanya thereafter did not allow grandparent contact and on January 6, 2010, grandmother filed: 1) Renewed Motion for Contempt, and 2) Grandparent Affidavit. Mother appealed the District Court Order on January 14, 2010. On January 26, 2010, mother filed her Brief Opposing Petitioner's Renewed Motion for Contempt. Mother filed motions with the District Court and Supreme Court to stay proceedings pending appeal. Both Courts denied her motions for stay.

Hearing on grandmother's Renewed Motion for Contempt took place on

February 16, 2010. At hearing, mother acknowledged not complying with the Court's Order directing compliance with grandparent contact schedule. The Court held mother in contempt a second time.

The Court fined Tanya $500 and again ordered her to comply with the grandparent contact schedule or serve time in jail. A written contempt order was issued by the Court. At the conclusion of the second hearing, the Court set a status hearing for March 2, 2010, to verify grandparent contact or put Tanya in jail.

New problems arose. Prior to the March 2nd status hearing, Tanya learned from her 11 year old's school teacher that grandmother had been coming to school and having contact with W.B.S. during school. Mother strongly objected to contact during school.

Nonetheless, Tanya and grandmother negotiated terms to conduct grandparent contact in line with the original stipulation as ordered by the Court. The parties agreed to terms and the March 2, 2010 Status Hearing was vacated. Grandmother agreed to no contact with the children at school or at times not specifically scheduled in the original stipulation.

Nonetheless, on March 3, 2010, grandmother thereafter went to the children's school demanding to see W.B.S.'s teacher. Tanya was called by the principal and left work to confront Sharon at the school. Tanya advised grandmother she was violating

parental boundaries and that she had no permission or right to disrupt her children or others at school. Tanya followed up with a March 3, 2010 e-mail to Sharon. Sharon responded by e-mail on March 3, 2010, that the school was public property and she was considering going back to 6th grade.

Mother filed: 1) Respondent's Motion for Contempt, Restraining Order and Injunction and Brief in Support, and 2) Affidavit of mother in support. The District Court set hearing on the motion for April 5, 2010.

B. Appellant's Position.

The Court used the wrong standard at hearing on mother's motion to terminate the stipulation for grandparent-grandchild contact. The format outlined in Tanya's Brief of September 11th should have been followed applying § 40-9-102. Where a mother stipulates to grandparent contact, but later objects to the contact, a determination of fitness must still be initiated by the Court. With a finding of fitness, comes a presumption that the mother's decision to oppose grandparent contact is correct.

The presumption favoring mother's wishes against grandparent contact stands, unless clear and convincing evidence rebuts the mother's wishes. The District Court applied the standard for a parenting plan modification under § 40-4-219, MCA, instead of the grandparent contact standards under § 40-9-102, MCA. Application

of the wrong standard completely transforms this case, gives grandparent the standing and rights of a parent, and constitutes reversible error.

Tanya presented substantial credible evidence supporting her decision to terminate grandparent contact which was misapprehended by the Court. Grandmother's sudden belief and assertion that her grandson is a "crystal child" destined to lead mankind into the future, is a significant deviation from her long held beliefs as a Jehovah's Witness. Mother's concern over grandmother's foreign belief system and its adverse effects on her children are legitimate reasons for mother to restrict further exposure. The "crystal child" belief of grandmother flies in the face of mother's religious beliefs as a Jehovah's Witness.

Grandmother's history of significant mental health issues, including attempting suicide; commitment to a psychiatric hospital; severe depression; being reborn as a different person with a different name and memory following her suicide attempt; and her need for a guardian and conservator to handle her affairs are relevant factors to look at when considering whether to terminate or continue grandparent contact.

Grandmother's history of poor judgment, including sending $22,000 to a Nigerian scam artist; losing her home for non-payment; writing a home loan payoff check on a fictitious bank account; and supplying alcohol to her son who had acute pancreatitis, are relevant factors to look at when considering whether to terminate or

continue grandparent contact.

The Court's denial of mother's choice to terminate grandparent contact, and its decision to hold her in contempt was based on an erroneous application of the law, a misapprehension of evidence presented, and an unconstitutional taking of parental rights, under the guise of granting grandparent contact.

5. APPELLANT'S STATEMENT OF FACTS.

A. Origin of Grandparent Contact.

In 2007, Grandmother Sharon Snyder filed a petition for grandparent contact pursuant to § 40-9-101, MCA, et seq. Her petition requested contact with her two grandchildren from her son Andrew Spaulding and her daughter-in-law Tanya Spaulding (hereafter Tanya or mother). Andrew died June 7, 2006. Andrew and Tanya separated and experienced serious marital problems prior to Andrew's death. Tanya did not have a good relationship with Sharon.

Initially, Tanya opposed Sharon's request for contact with her children. However, she felt pressured and intimidated by Sharon to agree to a stipulation for grandparent contact. (Affid. of Tanya Spaulding, 9/11/09, p. 2). Ultimately, Tanya signed a stipulation on May 22, 2008, granting Sharon specific periods of grandparent visitation on weekends, around Christmas, and during the summer. Tanya did not want to fight with Sharon and hoped she would be a grandmother and not interfere

in her parenting. (Affid. of Tanya Spaulding, 9/11/09, p. 2).

Tanya signed the stipulation in the office of Sharon's attorney. Tanya was represented by an attorney when the action began, but was not represented by an attorney on May 22, 2008, when she signed the stipulation. (Affid. of Tanya Spaulding, 2/15/10, p. 2).

After the children began visiting Sharon in May 2008, Tanya began to notice some disturbing behavior in son W.B.S. She did not initially associate the problems with Sharon. During the 2008-2009 school year, while W.B.S. was in 4th grade, he began exhibiting unusually strange behavior. (Condensed Transcript of Hrg., p. 12, l. 1-7). He refused to go to school, he became angry and physically violent toward Tanya, and told her he did not love her anymore and wanted to live with his grandmother. (Affid. of Tanya Spaulding, 2/15/10, p. 2; Condensed Transcript of Hrg., p. 24, l. 16-22).

W.B.S. refused to communicate with Tanya about what was going on. Tanya's younger son told Tanya that Sharon told the boys that Tanya was responsible for their father's death and to keep it secret from her. (Affid. of Tanya Spaulding, 9/11/09, p. 3; Condensed Transcript of Hrg., p. 24, l. 16-22). Ultimately, Tanya concluded the problems she noticed in W.B.S., stemmed from his contact with Sharon. (Condensed Transcript of Hrg., p. 29, l. 17-20). W.B.S.'s behavior problems got worse.

(Condensed Transcript of Hrg., p. 30, l. 5-7).

In July 2009, Sharon's daughter, Pamela Wright, gave Tanya a book that Sharon wrote about her life story. (Condensed Transcript of Hrg., p. 19, l. 25; p. 20, l. 1-4; Trial Exhibit A, admitted in Hrg. Transcript p. 121, l. 12-15, p. 122, l. 19). The book disturbed Tanya a great deal because it reveals Sharon's belief that W.B.S. is a "crystal child" with psychic powers. (Affid. of Tanya Spaulding, 9/11/09, p. 2). The manuscript also reveals that Sharon believes she was reborn as another person after her suicide attempt.

Sharon's daughter expressed concern over her mom's past and current mental state. Pam explained, "...she is no longer Sharon. She is Sarah, and she states that she has no recollection on who this family is. And she calls herself a walk-in as Sarah, and Sharon walked out the day that she tried killing herself. I really feel she has some psychiatric issues." (Condensed Transcript of Hrg., p. 57., l. 25.; p. 58., l. 1-12).

B. Reasons for Terminating Grandparent Contact.

In August 2009, Tanya cut off contact between Sharon and her sons, W.B.S., age 11, and D.C.S., age 9. (Condensed Transcript of Hrg., p. 29, l. 21-23). She did so for a number of reasons: 1) To prevent Sharon from instilling her children with spiritual belief of a "crystal child" contrary to those taught in her Jehovah's Witness

faith. (Condensed Transcript of Hrg., p. 13, l. 15; p. 14, l. 1-6). 2) Sharon ignored boundaries Tanya set for her children. (Condensed Transcript of Hrg., p. 13, l.8-16). 3) Sharon deceived Tanya by telling her she would not speak to the children about religious or spiritual matters or about the death of their father; yet she did so behind Tanya's back. (Condensed Transcript of Hrg., p. 23, l. 15-25). 4) After speaking to the boys of these things, Sharon told the boys not to tell Tanya what she told them. (Condensed Transcript of Hrg., p. 23, l. 17-25).

Sharon raised all of her own children, three sons and a daughter, in the Jehovah's Witness faith. (Condensed Transcript of Hrg., p. 59, l. 9-10). She finally quit the faith after 34 years in 2003. (Condensed Transcript of Hrg., p. 85, l. 8-15).

In 2005, Sharon's life became a "total disaster." She tried to kill herself by taking a large amount of prescription drugs. (Condensed Transcript of Hrg., p. 89, l. 20-24). She received three months of psychiatric care in 2005 for major depression. (Condensed Transcript of Hrg., p. 90, l. 5-8). Her daughter Pam Wright was court appointed to serve as her guardian and conservator. (Condensed Transcript of Hrg., p. 54, l. 12-15; p. 86, l. 9-14).

Sharon failed to pay her bills and was in very bad financial condition. (Condensed Transcript of Hrg., p. 54, l. 22-25). She sent $22,000 to a man in Nigeria, believing she would receive a much larger sum of money for her assistance.

(Condensed Transcript of Hrg., p. 89, l. 1-16). Sharon wrote a check for $80,000 upon a fictitious account, claiming to pay her home loan to Wells Fargo. (Condensed Transcript of Hrg., p. 55, l. 4-13). The check was issued on the Bank of Sharon. (Condensed Transcript of Hrg., p. 55, l. 6-10).

Sharon does not remember writing the check, but acknowledges it did occur. (Condensed Transcript of Hrg., p. 86, l. 4-8). Her daughter Pam had to sell Sharon's house to prevent Wells Fargo from taking legal action against her. (Condensed Transcript of Hrg., p. 56, l. 1-6; p. 54, l. 10-11). Sharon believed her daughter stole her money. She tried to sue her daughter for $120,000. (Condensed Transcript of Hrg., p. 56, l. 13-17, p. 87, l 6-8).

Sharon's son Andrew Spaulding, who is the children's father and Tanya's former husband, died from acute pancreatitis due to alcoholism on June 7, 2006. (Condensed Transcript of Hrg., p. 72, l. 7-8). Before his death, Sharon was in denial about his alcoholism and health problems and supplied him with alcohol. (Condensed Transcript of Hrg., p. 72, l. 8-9).

Sharon made poor decisions and used bad judgment in regard to her son. (Condensed Transcript of Hrg., p. 72, l. 7-8). Her daughter Pam does not allow her own children around Sharon because she does not think it is safe. (Condensed Transcript of Hrg., p. 73, l. 8-9). Sharon does not see her grandchildren from three

of her four adult children. (Condensed Transcript of Hrg., p. 108, l. 16-25; p. 109, l. 1-7).

Tanya is a parent. She is loving, caring and nurturing to her children. She knows when something is wrong with her children. She began seeing increasingly serious warning signs in her son W.B.S. Sharon's past includes mental illness and extremely poor judgement. She has a history of deception.

These are all legitimate factor for a parent considering whether a person should associate with her children. Sharon's past conduct combined with W.B.S.'s changed behavior after visits began, and Sharon's interference with Tanya's parenting provide ample basis for a parent to take preventative measures.

Sharon is not psychologically well and she has an unhealthy relationship with W.B.S., according to Tanya. (Condensed Transcript of Hrg., p. 31, l. 12-14). When visits with his grandmother stopped in August 2009, W.B.S. did much better. (Condensed Transcript of Hrg., p. 31, l. 15-16). Tanya took W.B.S. to see therapist Kendall Jackson to help with his anger, personality change, and to help deal with the loss of his relationship with Sharon. (Condensed Transcript of Hrg., p. 31, l. 2-5). These are steps a concerned parent takes to protect her child.

C. "Crystal Child" and Written Exchanges.

The manuscript of "The Unexpected Walk-In," written by Sharon and admitted

as Exhibit A at hearing describes the life of Sharon Snyder. (Condensed Transcript of Hrg., p. 75, l. 22-25; p. 76, l. 1-2). When asked at trial if felt she was reborn as "Sarah" after trying to commit suicide, Sharon testified, "A little, yeah." (Condensed Transcript of Hrg., p. 75., l. 14-18).

Sharon refers to her grandson W.B.S. as a "crystal child" in her manuscript. (Condensed Transcript p. 83., l. 8-14). On August 17, 2009, she again refers to her grandson as a "crystal child" in an e-mail she wrote to Tanya. (Condensed Transcript of Hrg., p. 83., l. 24-25.; p. 84., l. 1-4). In their August 19, 2009, letter to Tanya, Sharon and her husband George, proclaim unequivocably that W.B.S., is a "crystal child."

Sharon and George start out the letter claiming to honor Tanya's directions not to discuss religion with the children or demean her faith. They claim to honor her decisions for religious upbringing and respect her parental authority. They agree to keep their opinions to themselves. (Trial Exhibit C, admitted in Transcript p. 37, l. 19).

Halfway through, however, their idolatry of W.B.S. as a "crystal child" is evident. Their intention to guide him "as he grows in his abilities" is unmistakable. The two halves of this letter are incompatible. Their intent is not to defer, but to actively participate in his destiny as a "crystal child." (Condensed Transcript of Hrg.,

p. 84., l. 18-22; Trial Exhibit C, admitted in Transcript p. 37, l. 19). This type of involvement far exceeds grandparent contact as it usurps parental liberty in child rearing.

Nonetheless, at hearing on December 21, 2009, Sharon testified she no longer believed W.B.S. was a "crystal child." Instead, she viewed her grandson as a very smart child with lots of "deja vu." (Condensed Transcript of Hrg., p. 76., l. 20-25.; p. 77., l. 1-5).

Sharon credits her attorney for this revelation of insight into her grandson. He helped her identify her grandson as having a lot of "deja vu" instead of being a "crystal child." Sharon states, "I said that William was a crystal child because he had a lot of deja vu that I have -- with the help of my attorney -- been able to identify as deja vu." (Condensed Transcript of Hrg., p. 94., l. 8-14).

Sharon did not identify this distinction before talking to her attorney. (Condensed Transcript of Hrg., p. 94., l. 21-25.; p. 95., l. 1-2). Instead, Sharon acknowledged she was going to give her grandson guidance to fulfill his crystal child destiny despite being asked not to by Tanya. (Condensed Transcript of Hrg., p. 108., l. 10-15).

Tanya sums up her concerns in her August 17, 2009 e-mail to Sharon. Tanya states she has read parts of Sharon's book about W.B.S. being a "crystal child."

Tanya states her sons are in spiritual harm with Sharon and she fears for them because Sharon is very vocal about her beliefs. (Trial Exhibit B, admitted in Transcript p. 22, l. 13).

Tanya states she knows Sharon does not approve of her Jehovah's Witness religion. In light of Sharon's beliefs which focus on Tanya's son, W.B.S., as the "crystal child," and being very vocal in her beliefs, Tanya does not trust that Sharon will keep her beliefs to herself. But rather her beliefs will be transferred to Tanya's children, in violation of Tanya's religious authority over her children.

Tanya testified that she researched "crystal child" and discovered concepts she did not want her children exposed to. "Crystal children" are defined as another dimension of children with higher powers, and they have special gifts like telekinesis. They are eventually supposed to rule earth.

That is not what Tanya teaches her sons to believe. Tanya believes Sharon's practice of energy healing and belief in "crystal child" concepts is detrimental, unhealthy and contradicts her own religious beliefs which she instills in her children. (Condensed Transcript p. 23., l. 8-19; p. 24., l. 10-11).

Tanya initially signed the stipulation because, "I wanted to give her the benefit of the doubt. She's had troubles in the past, and I wanted to know that, you know, she was changed. But my son's attitude, the things he said to me, her book and her e-

mails, just it wasn't going to go the way I wanted it. To me she has no boundaries. When I ask her to do something, she will not do it." (Condensed Transcript of Hrg., p. 35., l. 11- 21).

D. District Court Ruling.

The Court states § 40-9-102, MCA does not come into play in its analysis in this case. (Condensed Transcript of Hrg., p. 118., l. 1-2). The Court acknowledges a mother's right to modify or negate a stipulation for grandparent contact, but applies parenting plan modification standards instead of grandparent contact standards. (Condensed Transcript p. 120., l. 7-16). Both parties argued the applicable standard at hearing which occurs in the Condensed Transcript of hearing at page 9, line 6 through page 11, line 20.

The District Court issued oral findings of fact contained at pages 118 through 120 of the Condensed Transcript of hearing in this case as follows:

1. The Court found the stipulation of May 22, 2008 was a contract.

2. The Court found § 40-9-102, MCA did not apply to this case.

3. The Court found that a stipulation and order involving Tanya and Sharon, was followed for approximately 15 months.

4. The Court found that Tanya knew of significant details about Sharon before signing the stipulation on May 22, 2008, including Sharon's suicide attempts,

guardianship and conservatorship for Sharon, whatever Sharon's role was in Andrew's drinking, his health and his death, and Sharon's mental health problems.

5. The Court found Tanya was represented by an attorney before she signed the stipulation on May 22, 2008.

6. The Court found that W.B.S. was seen by counselor Kendall Jackson, for the last several months, that no testing occurred, and that the counselor did not testify at hearing.

7. The Court found that if counselor Jackson had obtained any information harmful to Sharon, then the Court would have heard it.

8. The Court found that the boys were prevented by Tanya from appearing at Court and being interviewed.

9. The Court found that it received no information of any psychological harm to the boys.

10. The Court found that Exhibit A, a manuscript written by Sharon, which was discussed at hearing, was a draft version of her subsequent book that was listed under fiction.

11. The Court found no cause and effect between Sharon's book, the crystal child and harm to W.B.S.

12. The Court found no cause and effect between Sharon's religious beliefs

and harm to W.B.S.

13. The Court found no cause and effect between anything Sharon did and her son Andrew's death.

14. The Court found that Tanya Spaulding, Sharon Snyder and Pam Wright, all who testified at trial, were an incredibly dysfunctional group of people and the two boys are caught in the middle of the dysfunctionality.

15. The Court found that the stipulation and order was followed for 15 months then it was stopped.

16. The Court found no specific guidance to modify, negate or void the stipulation.

17. The Court found that the stipulation could be viewed as a contract, and if it was, then Tanya breached the contract.

18. The Court found the standard to modify, negate or void the stipulation at issue, was the same as that to modify a parenting plan.

19. The Court found that Tanya did not carry her burden under the parenting plan modification standard.

20. The Court found religious beliefs were mixed up with family feuds.

21. The Court found it did not receive enough evidence to grant Tanya's request to terminate the stipulation for grandparent contact.

The District Court issued oral conclusions of law contained at pages 118 through 122 of the Condensed Transcript of hearing in this case as follows:

1. The Court concluded a presumption applied to this case that if stronger evidence existed, it would have been presented. The Court concluded that since Tanya did not present counselor Kendall Jackson, and her sons at hearing, they could have offered nothing to support her case.

2. The Court concluded the stipulation of May 22, 2008 was a contract.

3. The Court concluded that § 40-9-102, MCA did not apply to this case.

4. The Court concluded the standard to modify, negate or void the stipulation at issue, was the same as that to modify a parenting plan.

E. Appendix Contents.

The Appendix attached hereto contains copies of:

1) Tanya's Brief in Support of Motion to Terminate (setting out fitness standard and presumption in favor of fit parent);

2) Tanya's Affidavit of September 11, 2009 (with August 17 e-mail and August 19 letter attachments);

3) E-mail exchange of Tanya and Sharon on March 3, 2010.

4) Attorney letter of March 4, 2010, on school contact.

6. STANDARDS OF REVIEW FOR ISSUES PRESENTED.

1. Did the District Court apply the wrong legal standard in proceeding involving Montana's Grandparent-Grandchild Contact statutes, at Title 40, Chapter 9?

This Court reviews a district court's conclusions of law to determine if the district court's interpretation of the law is correct. *In re Marriage of Rolf*, 2000 MT 361, ¶ 40, 303 Mont. 349, ¶ 40, 16 P.3d 345, ¶ 40. This Court's review as to questions of law is plenary. *In re Custody of D.M.G.*, 1998 MT 1, ¶ 10, 287 Mont. 120, ¶ 10, 951 P.2d 1377, ¶ 10.

2. Did the District Court err by failing to determine the fitness of a mother objecting to grandparent contact and by not applying a statutory presumption before granting grandparent contact pursuant to § 40-9-102, MCA?

This Court reviews a district court's conclusions of law to determine if the district court's interpretation of the law is correct. *In re Marriage of Rolf*, 2000 MT 361, ¶ 40, 303 Mont. 349, ¶ 40, 16 P.3d 345, ¶ 40. This Court's review as to questions of law is plenary. *In re Custody of D.M.G.*, 1998 MT 1, ¶ 10, 287 Mont. 120, ¶ 10, 951 P.2d 1377, ¶ 10.

3. Did the District Court, in action for grandparent contact, misapprehend the effect of the evidence presented by mother when it denied

mother's motion to terminate grandparent contact and held her in contempt of court?

The Supreme Court reviews a District Court's findings relating to custody modification to determine whether the findings are clearly erroneous. Findings are clearly erroneous if they are not supported by substantial evidence, if the District Court misapprehended the effect of the evidence, or if the Supreme Court's review of the record indicates that a mistake has been made. *In re Marriage of Olson*, 2005 MT 111, 327 Mont. 82, 111 P.3d 686 (2005). If the findings upon which a decision is predicated are not clearly erroneous, this Court will reverse the district court's decision to modify custody only where an abuse of discretion is clearly demonstrated. *In re Paternity and Custody of A.D.V.*, 2001 MT 74, ¶ 8, 305 Mont. 62, ¶ 8, 22 P.3d 1124, ¶ 8. The test for an abuse of discretion is whether the district court acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. *In re Marriage of Meeks* (1996), 276 Mont. 237, 242, 915 P.2d 831, 834.

4. Whether Montana's Grandparent-Grandchild Contact statutes, at Title 40, Chapter 9, violate a fit parent's due process right to terminate or modify grandparent contact once established by stipulation and order?

This Court reviews for correctness a District Court's interpretation and

application of statutes. *In re T.H.*, 2005 MT 237, ¶ 35, 328 Mont. 428, 121 P.3d 541. Questions of constitutionality involve a plenary review by this Court. *In re Custody and Parental Rights of D.S.*, 2005 MT 275, ¶ 15, 329 Mont. 180, 122 P.3d 1239. Statutes carry a presumption of constitutionality. *In re Custody and Parental Rights of D.S.*, 2005 MT 275, ¶ 15, 329 Mont. 180, 122 P.3d 1239. The party challenging the statute carries the burden of proving the statute's unconstitutionality beyond a reasonable doubt. *In re Custody and Parenting Rights of D.S.*, ¶ 15. This Court will resolve any doubt in favor of the statute. *State v. Michaud*, 2008 MT 88, ¶ 15, 342 Mont. 244, 180 P.3d 636.

5. Whether the distinction between "grandparent contact" and "custody," as identified in Montana case law, violates the fundamental constitutional rights of parents?

This Court's review of the constitutional issue of due process involves a question of law and, as such, the review is plenary. *Pickens v. Shelton-Thompson*, 2000 MT 131, ¶ 7, 300 Mont. 16, ¶ 7, 3 P.3d 603, ¶ 7. *In re Mental Health of K.G.F.*, 2001 MT 140, ¶ 17, 306 Mont. 1, ¶ 17, 29 P.3d 485, ¶ 17.

7. APPELLANT'S ARGUMENT.

1. Did the District Court apply the wrong legal standard in proceeding involving Montana's Grandparent-Grandchild Contact statutes, at Title 40,

Chapter 9?

The District Court did not apply the correct analysis when it used the standard to modify a parenting plan under § 40-4-219, MCA. § 40-4-219, MCA, governs when a court may amend a parenting plan. This section reads: (1) The court may in its discretion amend a prior parenting plan if it finds, upon the basis of facts that have arisen since the prior plan or that were unknown to the court at the time of entry of the prior plan, that a change has occurred in the circumstances of the child and that the amendment is necessary to serve the best interest of the child.... § 40-4-219, MCA.

This "substantial change standard," places the burden on Tanya and relieves Sharon of any burden. This is contrary to the burden Sharon would have under § 40-9-102, MCA. Accordingly, Tanya must show a substantial change of circumstances since the plan was implemented or of which the Court was not aware.

This is not correct. The Court should have first inquired into Tanya's fitness as a parent. Once fitness is determined, the District Court must accord Tanya's wishes proper deference. § 40-9-102, MCA.

This Court in *Kulstad,* outlined the *Troxel and Polasek* application of § 40-9-102(2). The Court reasoned that *Troxel* instructs, and our statute requires, a court to determine the fitness of an objecting parent whose parental rights have not been

terminated before a court may grant a petition for grandparent contact. *Polasek*, ¶ 15; § 40-9-102(2), MCA. A presumption arises in favor of the parent's wishes if the parent is fit. *Polasek*, ¶ 15. *Kulstad v. Maniaci*, 2009 MT 326, ¶ 68, 352 Mont. 513, ___ P.3d ___.

The December 30, 2009, Order appealed in this case incorporates the oral findings and conclusions of the Court made December 21, 2009, at the end of hearing. The Court concluded that § 40-9-102, MCA does not come into play in its analysis in this case. (Condensed Transcript of Hrg., p. 118., l. 1-2). The Court did acknowledge a mother's right modify or negate a stipulation for grandparent contact, but applied parenting plan modification standards of instead of grandparent contact standards of § 40-4-219, MCA. (Condensed Transcript p. 120., l. 7-16).

This Court reviews a district court's conclusions of law to determine if the district court's interpretation of the law is correct. *In re Marriage of Rolf*, 2000 MT 361, ¶ 40, 303 Mont. 349, ¶ 40, 16 P.3d 345, ¶ 40. The District Court was not correct in its application of § 40-4-219, MCA, in a grandparent contact case. This erroneous application places the burden on Tanya to prove a substantial change in the circumstances of the child which creates a barrier to her parenting autonomy and authority.

2. Did the District Court err by failing to determine the fitness of a

mother objecting to grandparent contact and by not applying a statutory presumption before granting grandparent contact pursuant to § 40-9-102, MCA?

The District Court did not apply the correct analysis because there is no indication that the District Court inquired into Tanya's fitness as a parent. Moreover, the District Court failed to accord Tanya's wishes any deference. *Polasek*, ¶ 15.

Tanya is the mother of the children at issue. Her husband Andrew Spaulding died in June of 2006. In 2007, Andrew's mother, Sharon Snyder petitioned for grandparent contact with her grandsons. In May 2007, Tanya stipulated to certain contact which stipulation was adopted and ordered by the Court.

During the year after visits commenced, Tanya identified and observed problems with to her children and cut off contact. In September 2009, she objected to the grandparent contact requested by Sharon and wished to terminate the previous arrangement arrived at by stipulation and order.

Montana's grandparent rights laws are addressed at Title 40, Chapter 9. If a parent objects to grandparent contact requested by a grandparent under this chapter, then the Court must conduct a hearing to make a determination of whether the objecting parent is fit. § 40-9-102(2), MCA. If the parent is found fit, the Court may grant grandparent contact only after a finding by clear and convincing evidence that

such contact serves the best interests of the children and after a finding by clear and convincing evidence that the presumption in favor of the parent's wishes has been rebutted. § 40-9-102(5).

This Court reviews a district court's conclusions of law to determine if the district court's interpretation of the law is correct. *In re Marriage of Rolf*, 2000 MT 361, ¶ 40, 303 Mont. 349, ¶ 40, 16 P.3d 345, ¶ 40.

The United States Supreme Court and the Montana Supreme Court have both held that a parent's right to the custody, care, and control of a child is founded upon a parent's constitutional right to liberty and have also held that it is the constitutionally protected right of a fit parent to determine who the parent's child may or may not associate with. *Polasek v. Omura*, 2006 MT 103, 332 Mont. 157, 136 P.3d 519 (2006), following *Troxel v. Granville*, 530 US 57 (2000).

Section 40-9-102, MCA, allows a grandparent reasonable rights to contact with a child. The District Court must determine the fitness of an objecting parent whose parental rights have not been terminated before a court may grant a petition for grandparent contact. *Polasek*, ¶ 15; § 40-9-102(2), MCA. A presumption arises in favor of the parent's wishes if the parent is fit. *Polasek*, ¶ 15.

This Court held in *Polasek*, that the District Court committed reversible error when it granted a petition for grandparent-grandchild contact under section §40-9-

102, MCA, against the wishes of the custodial parent who had not been found to be an unfit parent, based upon the single statutory criteria that the contact was "in the best interest of the child." *Id.*

The First Amendment guarantees religious liberty, and the right of parents to direct the religious upbringing of their children *Wisconsin v. Yoder* (1972), 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15. The analysis applied by the Court infringes this important right in this case. Tanya has asserted her religious preferences for her children which have been denied by Sharon and the Court. A presumption in favor of the parent's wishes must be applied.

The Court is not bound by the stipulation. It is well established in Montana that where the interests of minor children are concerned, a district court is not bound by an agreement reached by the parties. *In re Marriage of Syverson* (1997), 281 Mont. 1, 9, 931 P.2d 691, 696. "While terms of a contract may be introduced as evidence in some instances, *the custody and support of children* are never left to contract between the parties." *In re Marriage of Carlson* (1984), 214 Mont. 209, 217, 693 P.2d 496, 500.

Tanya's constitutional right as a parent to control the actions, conduct and associations of her children should be not interfered with, through the Courts, to control the actions of those children since she is a fit parent who takes good care of

her children. The Court should terminate the Stipulation and Order and grandparent visitation as requested by Tanya in this case.

Moreover, Tanya should not have been held in contempt for protecting her children and doing what is best for her children. The Court should not punish her or interfere with her decision as a parent. Her liberty right to parent and protect her children as she sees fit provides her authority to do what she did. The United States Supreme Court and the Montana Supreme Court have both held that a parent's right to the custody, care, and control of a child is founded upon a parent's constitutional right to liberty and have also held that it is the constitutionally protected right of a fit parent to determine who the parent's child may or may not associate with. *Polasek v. Omura*, 2006 MT 103, 332 Mont. 157, 136 P.3d 519 (2006), following *Troxel v. Granville*, 530 US 57 (2000).

It is a fit mother who decides what is best for her children. Not the grandmother; not the Court.

3. Did the District Court, in action for grandparent contact, misapprehend the effect of the evidence presented by mother when it denied mother's motion to terminate grandparent contact and held her in contempt of court?

The District Court misapprehended the effect of the evidence where it did not

find that Sharon interfered with Tanya's parenting, or religious matters involving the boys, or that Sharon did not assume a parenting role which extended beyond the right of grandparent contact.

This court views evidence in the light most favorable to the prevailing party. *In re Estate of Bradshaw*, 2001 MT 92, ¶ 11, 305 Mont. 178, 24 P.3d 211. The trial court determines the credibility of witnesses and the weight assigned to their respective testimony. *In re Bradshaw*, ¶ 11. This Court does not consider whether evidence supports findings that are different from those made by the district court. Instead, review is confined to determine whether substantial credible evidence supports the findings actually made by the district court. *In re Bradshaw*, ¶ 11. Clearly it does not.

The record in this case provides that Tanya is the sole surviving custodial parent. Tanya entered a stipulation for grandparent contact and later identified that the grandmother placed her children in spiritual harm, exposed them to improper influences, caused behavioral changes, and tried to deceive her.

Findings are clearly erroneous if they are not supported by substantial evidence, if the District Court misapprehended the effect of the evidence, or if the Supreme Court's review of the record indicates that a mistake has been made. *In re Marriage of Olson*, 2005 MT 111, 327 Mont. 82, 111 P.3d 686 (2005).

The District Court made findings inferring that since Tanya knew of Sharon's suicide attempts, mental health history, and guardianship before she signed the stipulation, she could not raise or rely on this information to support her claim to terminate grandparent contact. (Condensed Transcript of Hrg., p. 118, l. 6-12).

However, this Court has clearly ruled that pre-decree facts should be considered. Even under § 40-4-219, MCA, the statute requires the court to consider pre-decree facts unknown to the court. Even if the fitness of a parent was not challenged initially, the court must not exclude any testimony bearing on that issue which constitutes "facts ... unknown to the court" at the time the decree was issued. *Sarsfield v. Sarsfield*, 206 Mont. 397, 671 P.2d 595, 40 St. Rep. 1736 (1983), distinguished in *In re Marriage of Starks*, 259 Mont. 138, 855 P.2d 527, 50 St. Rep. 719 (1993), and followed in *In re Marriage of Johansen*, 261 Mont. 451, 863 P.2d 407, 50 St. Rep. 1403 (1993).

The District Court misapprehended the effect of the evidence. Accordingly, its denial of Tanya's motion to terminate grandparent contact and its ruling that she committed contempt of Court must be overturned.

4. Whether Montana's Grandparent-Grandchild Contact statutes, at Title 40, Chapter 9, violate a fit parent's due process right and ability to terminate or modify grandparent contact once established by stipulation and

order?

The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *Troxel v. Granville* (2000), 530 U.S. 57,66, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49, 57.

Statutes carry a presumption of constitutionality. *In re Custody and Parental Rights of D.S.*, 2005 MT 275, ¶ 15, 329 Mont. 180, 122 P.3d 1239. The party challenging the statute carries the burden of proving the statute's unconstitutionality beyond a reasonable doubt. *In re Custody and Parental Rights of D.S.*, ¶ 15. This Court resolves any doubt in favor of the statute. *State v. Michaud*, 2008 MT 88, ¶ 15, 342 Mont. 244, 180 P.3d 636.

In *Troxel v. Granville,* the United States Supreme Court considered whether a Washington nonparental visitation statute infringed upon a parent's fundamental right "to make decisions concerning the care, custody, and control" of her children. *Troxel v. Granville* (2000), 530 U.S. 57,66, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49, 57.

Troxel instructs that when a grandparent petitions for contact with a grandchild, a court must first inquire whether the child's parent is fit; that is, the court must determine whether the parent "adequately cares for his or her children." *Troxel,* 530

U.S. at 68, 120 S.Ct. at 2061, 147 L.Ed.2d at 58. If the parent is fit, a presumption arises in favor of the parent's wishes because "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a `better' decision could be made." *Troxel,* 530 U.S. at 72-73, 120 S.Ct. at 2064, 147 L.Ed.2d at 61.

The plurality concluded that the Washington statute, as applied to Granville, was unconstitutional, reasoning that the language in the statute was "breathtakingly broad," *Troxel,* 530 U.S. at 67, 120 S.Ct. at 2061, 147 L.Ed.2d at 57; the trial court failed to give any special weight to the fit parent's wishes, *Troxel,* 530 U.S. at 69, 120 S.Ct. at 2062, 147 L.Ed.2d at 58; and, the trial court improperly applied a "presumption in favor of grandparent visitation," *Troxel,* 530 U.S. at 72, 120 S.Ct. at 2063, 147 L.Ed.2d at 60.

The plurality emphasized that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children," *Troxel,* 530 U.S. at 66, 120 S.Ct. at 2060, 147 L.Ed.2d at 57. The Court concluded that there is no reason for the state to question the ability of a parent to rear her children so long as the parent adequately cares for her children. *Id.*

Like *Troxel*, the problem here is not the Court's intervention, but that it gave

no special weight at all the Tanya's determination of what is best for her children. Rather, the Court favored the *status quo* parental contact under the stipulation, applying a presumption in favor of a grandparent. *Troxel,* 530 U.S. at 68-69, 120 S.Ct. at 2061-62, 147 L.Ed.2d at 58.

There is no indication that the District Court inquired into Tanya's fitness as a parent. Moreover, the District Court failed to accord Tanya's wishes any deference. To the contrary, in its findings of fact, the District Court referred to her wishes only in passing stating: "We've got religious beliefs mixed up with family feuds."

The absence of any method for a parent to modify or revoke existing grandparent contact under Montana's grandparent contact statutes infringe upon Tanya's fundamental right to parent. *In re Parenting of J.N.P.*, 2001 MT 120, 305 Mont. 351, 27 P.3d 95; *Polasek v. Omura*, 2006 MT 103, 332 Mont. 157, 136 P.3d 519; *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000).

5. Whether the distinction between "grandparent contact" and "custody," as identified in Montana case law, violates the fundamental constitutional rights of mother?

This Court's distinction between "grandparent contact" and "custody," in *In re Grandparent-Grandchild Contact of Stewart v. Evans*, and *In re Parenting of D.A.H.*, violates the fundamental constitutional rights of mother, because it restricts

her right to terminate contact if grandparent intercedes in the parent-child relationship.

Tanya's parenting decisions, direction and authority have been circumvented due to a grant of grandparent contact. In particular, Tanya's ability to make religious decisions and associations for her sons has been revoked in violation of her First Amendment guarantees to religious liberty, and to direct the religious upbringing of her children. *Wisconsin v. Yoder* (1972), 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15.

The grandparent contact order of the District Court makes her children subject to the preferences and decisions of the grandmother, whom the children are with on alternating weekends, 3 days over Christmas Break, and for a week in the summer throughout each year.

Tanya has asserted her parenting authority but it has been denied. She resorted to the Court but was held in contempt twice. While other statutory schemes for custody require a parent's rights to be terminated before a nonparent can assert control, the grandparent contact scheme has been ignored, leaving a glaring barrier to a parent's rights, when a grandparent oversteps "contact" as defined by this Court.

In re Parenting of J.N.P., a young mother left her child with her aunt and uncle who provided for the child while the mother got on her feet. Two months later, the aunt and uncle petitioned for a parenting plan. The District Court dismissed the

petition and this Court affirmed stating "Our case law does not permit destruction of a natural parent's fundamental right to the custody of his or her child based simply on the subjective determination of that child's best interest." *In re Parenting of J.N.P.*, 2001 MT 120,¶ 26 305 Mont. 351,¶ 26 27 P.3d 95,¶ 26.

In *Aschenbrenner* this Court concluded that whether the grandparents were better able to provide a good environment for the children than the mother was irrelevant because the mother had a fundamental constitutional right to the custody of her children. The "best interest of the child" test is only relevant after there has been a showing of dependency or abuse or neglect pursuant to our termination of parental rights statutes, or in custody disputes between two natural parents. *In re Aschenbrenner* (1979), 182 Mont. 540, 549, 597 P.2d 1156, 1162.

Here grandmother is afforded the same discretion, guidance, and control over Tanya's children as a non-custodial parent. Sharon has the right to direct the children's activities and make decisions regarding their religion during her visits. The mother's fundamental right to provide exclusive religious training, and to restrict contact with a grandmother she considers harmful to her children has been restricted without any termination of her parental rights, due to the false distinction between "custody" and "grandparent contact."

Of course, this Court has previously distinguished a "child custody

determination" and "visitation with respect to a child," from the "contact" with a child that grandparents may seek under Chapter 9, in *In re Grandparent-Grandchild Contact of Stewart v. Evans*, 2006 MT 102, 332 Mont. 148, 136 P.3d 524 (2006). While the "Best Interest Test" is not applicable to non-parent custody cases because parent rights prevail, a parent whose parent's rights are usurped by a grandparent in the course of grandparent contact case must proceed under the "Best Interest Test."

In *Stewart*, this Court points out that grandparents are not designated as parties under the UCCJEA unless they serve as parents or guardians to the child. This Court explains that § 40-7-202(1), MCA, which provides jurisdiction over child custody proceedings, refers to the "child," "parent," and "person acting as a parent" as the relevant parties whose presence or absence from the state must be determined.

Notably absent, this Court informs, is any reference to a grandparent. *Stewart* at ¶ 14. In *Stewart*, this Court cites *In re Parenting of D.A.H.,* 2005 MT 68, 326 Mont. 296, 109 P.3d 247, for the proposition that Chapter 9 is a means for grandparents to get contact with grandchildren without interceding as a parent. It "permits grandparents some means of obtaining non-custodial contact with their grandchildren." *D.A.H.*, ¶ 8. Notably absent in this Court's analysis of Chapter 9, is any mechanism to restore parent's rights if a grandparent intercedes once in possession of grandparent contact. This is the situation Tanya is in. She has rights

in principle, but not in practice.

This Court recognizes the importance of the rights involved in the natural parent-child relationship. The Montana Legislature has enacted a variety of statutory schemes pertaining to custody of children and termination of parental rights, and regulating the manner in which third parties may intercede in the parent-child relationship.

This Court has identified at least five statutory schemes in Montana noting a degree of similarity as to general subject matter. Each statutory scheme has specific purposes and procedures which must be followed to ensure that a judgment or order in a given case is valid. *Guardianship of Aschenbrenner*, 182 Mont. at 552-53, 597 P.2d at 1164. However, none of these assurances apply to protect parent rights in a grandparent contact case. No protections exist.

While this Court emphasizes the importance of an initial determination of the precise nature of the underlying proceeding involving custody of children in *Guardianship of Aschenbrenner*, 182 Mont. at 552-53, 597 P.2d at 1164, the same precautions are notably absent from Grandparent rights cases.

8. APPELLANT'S SUMMARY.

Tanya's assertion of her parental rights to terminate existing grandparent contact under § 40-9-102, MCA, were denied due to the District Court's improper

application of a parenting standard to grandparents. Tanya asserted her constitutional rights as a parent, objected to grandparent contact, and outlined the applicable standard of § 40-9-102, MCA.

She correctly outlined the determination for of parental fitness and the presumption in favor a fit parent's wishes. Nonetheless, at hearing the Court chose the wrong standard of § 40-4-219, MCA, and consider only evidence occurring after the stipulation on May 22, 2008.

Tanya asserted that evidence of past events was relevant to support her decision to terminate contact, but the Court disagreed. The Court heard testimony from Tanya, Sharon, and Pamela Wright, who is Sharon's daughter.

The Court ruled that Tanya did not meet her burden of proof and denied her motion to terminate grandparent contact and held Tanya in contempt, ordering her to comply with grandparent contact as she agreed to do on May 22, 2008.

Tanya refused contact and was found to be in Contempt a second time, fined $500 and ordered to comply with the contact or go to jail. New problems arose when Sharon initiated visits with the children during school. Mother strongly objected, yet negotiated terms to conduct grandparent contact as ordered.

The parties agreed no contact would occur at school yet Sharon went to the children's school on March 3, 2010. Tanya left work to confront Sharon at the school

and advised Sharon she was violating boundaries and disrupting her children and others at school.

The Court's use of the wrong standard at hearing has effectively reduced Tanya's parental rights. While waiting for this Court's decision, she must accept Sharon's contact and influence on her children, without any say over what occurs. This is a helpless position for parent to be in. The District Court's applied standard gave a grandparent standing and rights of a parent.

Tanya presented substantial credible evidence supporting her decision to terminate grandparent contact which was misapprehended by the Court. Grandmother's divergent spiritual belief, history of significant mental health issues, and poor judgment are relevant factors when considering whether to terminate or extend existing grandparent contact.

The Court's denial of mother's choice to terminate grandparent contact, and its decision to hold her in contempt was based on an erroneous application of the law, a misapprehension of evidence presented, and an unconstitutional taking of parental rights, under the guise of granting grandparent contact.

9. CONCLUSION.

Tanya, as a fit mother, must have prompt and effective recourse to enforce and protect her parental rights when they are interfered with or interceded by her former

mother-in-law. A court must determine the fitness of an objecting parent before a court may granting grandparent contact. *Polasek*, ¶ 15; § 40-9-102(2), MCA. A Court must presume a parent's wishes are correct. *Polasek*, ¶ 15; *Kulstad*, ¶ 68. Moreover, a parent's rights must be afforded some priority over a grandparent contact pending resolution of a dispute. Harmful association can be easily postponed, but once they occur, can never be undone.

DATED this 26th day of March, 2010.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Appellant's Brief was served by first class mail, postage prepaid, upon the attorney for the Appellee this 26th day of March 2010,, addressed as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(d) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced, and the word count calculated by Corel WordPerfect 12 for Windows, is 8852 words, excluding Table of Contents; Table of Cases, Statutes and Other Authorities; Certificate of Service; Certificate of Compliance; and Appendix.

DATED this 26 day of March, 2010.

Benjamin J. LaBeau